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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

v.

CITY OF BURBANK and DOES 1 through 100, inclusive,

Defendants.

Case No. BC 422252
Assigned to: Hon John L. Segal, Dept. 50

DEFENDANT CITY OF BURBANK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL OR ALTERNATIVE JNOV [Declarations Separately filed; Notice of Intent filed April 27, 2012]

DATE: June 6, 2012
TIME: 8:30 a.m.
DEPT: 50
Trial Date: March 5, 2012
Action Filed: Sept. 22, 2009

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Following an 11-day jury trial which concluded with the slimmest permissible (9-3) verdict for Plaintiff on March 19, 2012, a judgment against Defendant, City of Burbank ("City"), was entered on April 12, 2012. City and its police department were the focus of this wrongful termination case arising from the claimed demotion and subsequent discharge for cause of former Deputy Chief of Police William Taylor. The pre-trial and trial proceedings raised a number of legal issues that are implicated in the City's April 27, 2012 Notice of Intention to Move for New Trial. These legal issues include matters the City raised by pre-trial motions in limine, by the City's submission of proposed *voir dire* question for the Court to inquire of prospective jurors, by the *voir dire* process itself, by evidentiary rulings during the trial, and by the Court's decisions to give special instruction submitted by Plaintiff but to refuse a CACI instruction submitted by City.

While the Notice of Intention lists multiple grounds for granting a new trial, four issues are paramount. First, two jurors who voted for plaintiff failed to disclose major negative contacts with law enforcement despite being asked by the Court in *voir dire*. Trial Juror Nos. 6 and 7[1] were both arrested -- one involving a concealed weapon and the other involving repeat offenses and issuance of a Bench warrant -- and both pled no contest and were convicted. Prospective jurors' law enforcement contacts were so critical a ground for bias that the City formally requested the Court to inquire about it during *voir dire*. The Court did so inquire multiple times, but Jurors No. 6 and 7 remained silent. The defense did not learn of either juror's criminal record until after the trial. Concealment of bias by a juror during *voir dire* constitutes serious misconduct. In a highly contentious case, where the ultimate verdict after two days of

[1] For purposes of this memorandum of points and authorities and declarations in support thereof, the City will refer to both jurors and prospective jurors by their seat number in the courtroom, rather than by name, in an effort to protect the privacy of these private citizens. The City has also redacted trial transcripts from *voir dire* where prospective jurors were identified by name, and the City has handwritten in the seat numbers for reference. Excerpts from trial transcripts are attached as exhibits to Ronald Frank's declaration. Finally, the City has redacted records revealing criminal histories of Jurors No. 6 and 7 which are exhibits to the declaration of Carol Amberg, but unredacted copies of these records are being provided to Plaintiff's counsel. The City will be prepared to lodge unredacted copies of the trial transcripts and records revealing criminal backgrounds for Jurors No. 6 and 7 at the time of hearing, or at such earlier time as the Court instructs.

deliberations was only 9 votes to 3 in favor of the plaintiff, misconduct by a juror is sufficient to require granting a new trial.

Second, the Court itself erred in rejecting the City's proffered CACI instruction No. 2405. This Judicial Council-approved instruction defines good cause for termination to include reliance on an investigation that gave the employer a basis for believing plaintiff engaged in misconduct. Both sides submitted extensive evidence supporting the use of CACI 2405 at this trial. That evidence included Gardiner's investigation report #34 [Trial Exhibit ("Tr. Exh.") 265], the Notice of Termination [Tr. Ex. 71], testimony by Gardiner, Misquez, Puglisi, Stehr, Lowers, and Taylor concerning the foundation for Gardiner's report #34, testimony by Varner, Angel and LaChasse regarding the City's good faith reliance on that report, as well as opening statements by both sides regarding the bona fides of the City's assertion of reliance on Gardiner's investigation. A party is entitled to instructions on its legal theories and defenses where there is evidence to support them. The Court's failure to instruct on the good cause defense requires a new trial.

Third, the Court instructed the jury on Plaintiff's special instruction No. 18 regarding the effect on credibility of a witness having read trial testimony. The City objected to this surprise and improper instruction, which unfairly prejudiced the defense. JJ Puglisi, the Lieutenant who testified that Plaintiff interfered with his 2008 Internal Affairs investigation of Omar Rodriguez, truthfully revealed on cross that he looked at the trial transcript of only Plaintiff's and Lowers' testimony. Special Instr. No. 18 suggested to the jury that Puglisi's reading of that testimony violated the Court's witness exclusion order, even though Puglisi did not violate that order and the Court had not barred counsel from telling or reading witnesses the testimony of other witnesses. Post-trial interviews of jurors show that many several jurors discounted Puglisi's testimony because of that instruction. But neither the letter nor spirit of Evidence Code § 777(a) was violated since Puglisi's reading of Plaintiff's or Lowers' testimony did not and could not have tainted Puglisi's own testimony, which was totally consistent with the IA interview he gave to Gardiner 2-1/2 years before the trial.

Fourth, there was no substantial evidence to prove a retaliatory animus for Taylor's termination. Plaintiff's retaliation case was limited to evidence that Stehr and Flad had some axe to grind with Taylor. There was no evidence that Scott LaChasse or Tom Angel, who made the

termination decision without input from Flad or Stehr, had any such axe or motive. The Court, sitting as the 13th juror, observed the dearth of proof of retaliatory motive for Plaintiff's termination, and should either grant a JNOV on these grounds, or at a minimum order a new trial.

Any one of these errors by themselves warrants a new trial. However, rather than await the outcome of a time-consuming and expensive appeal, the City prefers to correct these errors at the trial court level and re-try the case now rather than after a likely protracted appeal.

ARGUMENT

II. THE COURT SHOULD GRANT THE MOTON FOR A NEW TRIAL BECAUSE ONE OR MORE OF THE STATUTORY GROUNDS HAS BEEN MET.

The grounds for a new trial are wholly statutory. *Smith v. Superior Court* (1976) 64 Cal.App.3d 434, 436. Pursuant to Code of Civil Procedure § 657, a jury verdict may be vacated, in whole or in part, and a new trial granted, for any of the following causes materially affecting the substantial rights of an aggrieved party: (1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial; (2) misconduct of the jury; (6) insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law; or (7) error in law, occurring at the trial and excepted to by the party making the application. Where the judge hearing the motion for a new trial presided over the trial, the Court need not review the entire trial transcript in making its decision. *Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1324. It is the trial judge's duty to set aside a jury verdict when his conscience is impressed with the injustice of it. *Moore v. San Francisco* (1970) 5 Cal.App.3d 728, 738. Here, the verdict should be set aside.

A. Jurors 6 and 7 Withheld Material Information During *Voir Dire* Which Would Have Revealed a Potential Bias, Thereby Precluding Defense Counsel from Asking Follow Up Questions and Exercising A Peremptory Challenge.

A defendant has the right to trial by unbiased, impartial jurors. *People v. Polk* (2010) 190 Cal.App.4th 1183, 1201. The City was deprived of this right due to the concealment of anti-law enforcement bias by Trial Juror Nos. 6 and 7. The concealment of bias by a juror during *voir dire* constitutes serious misconduct warranting a new trial. *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 509, citing *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.

Like the instant case, *Enyart* involved jurors' concealed biases against a police department in a case with the bare minimum 9-3 verdict for a plaintiff; the Second District held the trial court abused its discretion in failing to grant a motion for new trial on the grounds of prejudicial juror misconduct. This Court should exercise its discretion and order a new trial on those grounds.

A party moving for a new trial on the ground of juror misconduct must establish both that misconduct occurred and that the misconduct was prejudicial. *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 57. "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution. One of the purposes of voir dire is to expose the possible biases of potential jurors, who can be excused for cause if bias is demonstrated or excused through a peremptory challenge if counsel suspects a possibility of bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully. A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." *Ovando*, *supra*, 159 Cal.App.4th at p. 58; see *In re Hamilton* (1999) 20 Cal.4th 273, 294 ("when a juror conceals bias on *voir dire*...the event is called juror misconduct"). "A showing of misconduct creates a presumption of prejudice." *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 162.

In the present case, Juror No. 6 – who voted against the City -- concealed the fact of his past negative experience with law enforcement during *voir dire*. After the verdict was given, counsel for the City discovered that Juror No. 6 was arrested in 2003 for possession of a concealed weapon (a dirk or dagger) and failure to disperse, both misdemeanor charges. See attached Declaration of Carol Amberg ("Amberg Decl.") and City's Request for Judicial Notice filed concurrently herewith. He bargained a plea, pled no contest, and was convicted of the lesser count. See Amberg Decl., *supra*. None of the City's trial counsel, nor the City Attorney's office, knew of Juror No. 6's criminal background, or his concealment of this material information, until well after the trial was complete. See Declarations of Ronald F. Frank, ¶25; Linda M. Savitt, ¶6; and Carol Humiston, ¶2.

Similarly, Juror No. 7 – who also voted against the City – concealed information during

voir dire regarding a series of misdemeanor charges filed against her. Juror No. 7's criminal record also was not discovered until after the trial was completed and the verdict was given. See Frank Decl., ¶25, Savitt Decl., ¶6, and Humiston Decl., ¶2. Juror No. 7's criminal record includes three separate misdemeanor cases with charges including driving with a suspended license, a marijuana charge, and driving without insurance. Amberg Decl., ¶¶11, 13-14 and City's Request for Judicial Notice filed concurrently herewith. A bench warrant was issued for her failure to appear in court and the court docket shows she was arrested and appeared "in custody" at her arraignment less than one year before she became a trial juror here. All of these charges were filed since late 2009, i.e, within 2-1/2 years of the trial. These are prima facie proof of negative contact with law enforcement officials, ones Juror No. 7 chose not to disclose so she could remain on the jury and vote against a law enforcement agency.

1. The Court Directed Jurors To Disclose Information Regarding Past Dealings, Good or Bad, With Law Enforcement, and Many Did.

Prior to *voir dire* the Court explained that the "goal of jury selection is to choose 12 jurors and an appropriate number of alternate jurors who can be fair and impartial to both sides and who can decide the case based solely on the evidence you hear in this courtroom and not from any other source." [1 Reporter's Transcript ("RT"),12:25-13:2[2] (emphasis added).] During *voir dire*, prospective juror 6, a recent law school graduate, interrupted the proceedings and advised the Court that he did not think he could be fair and impartial due to his morals and legal training. [1 RT, 31:3-32:24.] Thereafter, the Court asked whether anyone else could not be fair and impartial. In response, prospective juror 3 raised her hand and volunteered that she had previously had a negative experience with law enforcement, and she followed up later stating that the officers had been rough when handcuffing her. [1 RT, 32:25-33:8; 40:7-25.] Subsequently the Court asked whether anyone "had any contact or involvement with law enforcement that was particularly positive or negative that you think might affect your ability to be fair and impartial" and then

[2] Trial commenced on March 5, 2012, and continued for 11 total days ending March 19, 2012. References to the RT will be by volume, with volume 1 being the 1st day of trial, so 1 RT refers to the first volume of RT or the 1st day of trial, and then page:line references provided such as 1 RT 3:5-7, etc.

again asked, "Have any of you had any contact with a law enforcement organization of any kind, such as the police or security or anything like that, that was strictly positive or negative." [1 RT, 39:11-19 (emphasis added).] Prospective juror 6 again raised his hand and described his negative experiences with law enforcement [1 RT, 39:21-40:3]. Another prospective juror, number 2, explained that he did not think he could be impartial due to a 23-year-old DUI conviction. [1 RT, 49:2-50:25.] Still another prospective juror, number 1, shared a negative experience with law enforcement from 10 years earlier [1 RT, 57:14-24], and prospective juror 18 shared his extensive arrest record for nonviolent civil disobedience [1 RT, 102:25-103:11].

None of the prospective jurors who revealed their biases against law enforcement or prior negative contact with law enforcement officers remained as trial jurors [Frank Decl ¶7]. The forthcoming jurors who did disclose their past negative contact with police were dismissed either by peremptory challenge or for cause.[3]

2. Information About Past Contacts With Law Enforcement Was Material to The City's Effort to Select A Fair Jury.

The fact that a prospective juror had a prior negative contact with a law enforcement official or agency was material to the City in *voir dire* [Frank Decl. ¶¶4-8]. The City filed a list of proposed *voir dire* topics and questions to the Court to inquire of prospective jurors, including the following topic designed to reveal actual or implied bias against police agencies:

> "3. Have any of you had any contact or involvement, whether positive or negative, with members of a law enforcement organization such as police, security, military, or otherwise?
>
> a. If you would prefer to talk about that contact in private, let me know and we can discuss it separately from other jurors.
>
> b. Is there anything about that experience that would make you more likely to favor one side or the other in this case?" [Feb. 27, 2012 Proposed Voir Dire Questions, p. 3].

The Court itself recognized the materiality of this requested *voir dire* topic by selecting it as one of the few of the defense-requested list as to which the Court actually asked prospective jurors. The City desired to learn both of the existence of a past contact and whether prospective jurors

[3] Prospective juror 6 was dismissed for cause by the Court [1 RT, 91:8-92:5]. Prospective juror 3 was the City's first peremptory challenge [id. at 92:19-21] because of her negative experience with the LAPD, the same agency with which Jurors Nos. 6 and 7 had their prior negative experiences [Frank Decl. ¶7]. Prospective jurors 1 and 18 were also excused by peremptory challenge, but by Plaintiff before the defense decided to excuse them [1 RT, 92:10-13, 115:1-4].

believed it would bias them, so that counsel could assess both the potential for a challenge for cause and the possible use of a peremptory challenge. [Savitt Decl. ¶3; Frank Decl. ¶8]

3. Juror Nos. 6 and 7 Intentionally Concealed Material Information on Voir Dire that Would Have Revealed Actual or Implied Bias.

Although Juror No. 6 actively participated in *voir dire* [see, e.g., 1 RT, 11:16-12:2; 25:1-16; 36:1-11; 43:27-44:27; 51:26-52:10], he did not volunteer any information in response to inquiries pertaining specifically to his past negative experience with law enforcement, even after other prospective jurors had revealed their negative contacts with law enforcement officials as set forth above. Similarly, Juror No. 7 also participated in *voir dire*, but did not reveal her negative experiences with law enforcement [1 RT, 20:4-21:2; 73:9-74:25; 87:1-7]. Even when a broad question was posed by counsel for the City, Ms. Savitt, as to whether there is "anything that somebody feels they need to share with us that would help us evaluate whether you're…an unbiased and fair juror or someone who would be comfortable sitting as a juror in this type of case," both Jurors No. 6 and 7 remained silent.

Even had Jurors No. 6 and 7 been uncomfortable disclosing their respective experiences with law enforcement openly before the other prospective jurors, the Court offered the option for prospective jurors to speak outside of the presence of others to hear such information [1 RT, 13:20-27; 99:8-28]. The City had specifically suggested the option of a private sidebar in its proposed Voir Dire Questions to encourage honesty [Frank Decl. ¶5]. Neither Jurors No. 6 nor 7 volunteered any information pertaining to their prior respective arrests and convictions. [*Id.*] Moreover, neither Jurors No. 6 nor 7 revealed either the facts of their prior contacts with law enforcement or their respective self-assessments as to whether their prior contact would lead them to favor or disfavor a particular side in this trial. [*Id.*] An arrest and conviction are presumptively negative contacts with police. Whether either juror willfully concealed their prior arrests and convictions in order to remain on the jury, or made an unspoken judgment that they believed it would not affect their fairness, both Jurors No. 6 and 7 committed prejudicial misconduct.

Jurors No. 6 and 7's silence during *voir dire* in response to several pointed inquiries by the Court and counsel as to prospective jurors' experiences with law enforcement, and despite

revelations by several other prospective jurors regarding their past experiences with law enforcement, reveals their respective intentional concealment of their own criminal background. "[I]ntentional concealment of material information by a potential juror may constitute implied bias." *People v. McPeters* (1992) 2 Cal.4th 1148, 1175. Nevertheless, a juror's concealment of material facts on *voir dire* need not have been intentional in order to be considered misconduct. The right to an impartial jury is "independent from the intent of the juror to conceal". *Shipley v. Permanente Hospitals* (1954) 127 Cal.App.2d 417, 424, disapproved on other grounds by *Kollert v. Cundiff* (1958) 50 Cal.2d 768 and *Dunford v. General Water Heater Corp.* (1957) 150 Cal.App.2d 260.

4. The Misconduct of Juror Nos. 6 and 7 was Prejudicial to the City.

Juror misconduct raises a rebuttable presumption that the misconduct was prejudicial. *In re Hamilton, supra*, 20 Cal.4th at p. 295. Misconduct is prejudicial if there is a substantial likelihood that the juror was biased and that the misconduct affected the verdict. (Citations omitted.)" *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 57-58. The facts of Jurors Nos. 6 and 7 respective negative contacts with law enforcement and their arrest/ citations and *nolo* pleas, were pertinent information about which the Court and counsel should have had an opportunity to ask follow up questions, as they had of other jurors in light of their various disclosures during *voir dire*. Moreover, even if the Court had opted not to dismiss Jurors No. 6 or 7 for cause based on their respective criminal histories, the City was deprived of the opportunity to use one or two of its four remaining peremptory challenges to dismiss Jurors No. 6 or 7 from the jury panel. [Savitt Decl. ¶ 6; Frank Decl. ¶25.] Therefore, since Jurors No. 6 and 7 both ultimately voted against the City in a nine to three vote, their respective acts of misconduct were independently prejudicial to the City as a matter of law. *See Enyart, supra*, 76 Cal.App.4th at p. 511 ("Given the closeness of the verdict ...[,] bias on the part of any one of the majority-voting jurors is **necessarily prejudicial**" where there was a nine-to-three vote)(emphasis added).[4]

[4] Juror No. 6 was one of a very few jurors who remained in the corridor after the verdict; he told counsel that he discounted the testimony of Lt. Puglisi based on the Court's instruction concerning witness review of trial transcripts [Frank Decl. ¶18].

B. The Court Erred in Failing to Give CACI Jury Instruction No. 2405, Which was Supported by the Case Law and Warranted by the Evidence at Trial.

On the ninth day of trial, March 15, 2012, both Plaintiff and the City presented the Court with new jury instructions [9 RT, 1:17-28; 3:18-4:11; 5:4-6:10.] Plaintiff's proposed special instruction 18, which will be discussed in Section C below, was preceded by an oral motion to strike the testimony of a witness who admitted to reviewing a portion of the trial transcript before his testimony. The City proposed CACI instruction No. 2405, inadvertently omitted from the original jury instruction packet but presented immediately after the oversight was discovered [9 RT, 1:19-28; 3:18-20]. CACI No. 2405 is supported by established legal authority[5] and the City made no changes to the approved form, other than filling in the names of the parties as instructed by the brackets within the form [9 RT, 3:18-4:11.] See Frank Decl., Exh. 5. Following oral argument on these new instructions, the Court decided to instruct the jury on Plaintiff's unsupported Special Instruction No. 18, but declined the give CACI 2405 (which was supported by both a California Supreme Court decision and a Court of Appeal decision cited by counsel and copies of those opinions were submitted to the Court) for reasons the Court itself conceded are "thin." [9 RT, 159:17-27.]

The City's version of CACI 2405 closely tracked the original version of the instruction:

> William Taylor claims that City of Burbank did not have good cause to discharge or demote him for misconduct. City of Burbank had good cause to discharge or demote William Taylor for misconduct if City of Burbank, acting in good faith, conducted an appropriate investigation giving him *[sic]* reasonable grounds to believe that William Taylor engaged in misconduct.
>
> An appropriate investigation is one that is reasonable under the circumstances and includes notice to the employee of the claimed misconduct and an opportunity for the employee to answer the charge of misconduct before the decision to discharge or demote is made. You may find that City of Burbank had good cause to discharge or demote William Taylor without deciding if William Taylor actually engaged in misconduct.

See Frank Decl., Exh. 5.

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[5] CACI No. 2405 is entitled "Breach of Implied Employment Contract – Unspecified Term – "Good Cause" Defined – Misconduct, and is based upon the California Supreme Court case entitled *Cotran v. Rollins Hudig Hall Intern., Inc.* (1998) 17 Cal.4th 93, 107-108. Regardless of the title of the instruction as to an implied employment contract, CACI 2405 did pertain to the case here pursuant to *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 278-279. *Nazir* applies *Cotran* to a retaliation case, which was the claim in the case at bar.

The Court expressed its reasons for rejecting CACI 2405 as follows: "It was, first of all, late. So I didn't have the time to research it as I did with the other ones. So I didn't really have a chance or an opportunity to do that with the last instruction. That is number 1. Number 2, I thought that as phrased, as applied to this case, it was argumentative. It seemed to track the CACI instruction, but I thought it was a little strong because I know you had a case which I didn't get a chance to read that says that instruction also applies in retaliation cases. But I couldn't match it up to see if the wording changed. That was two. And the third reason was -- I can't remember the third reason. ... I can't remember the third reason, yes." [9 RT, 155:20-156:28.]

The Court's reasons for denying CACI 2405 are unjustified. The Court's tardiness reason does not hold up as Plaintiff's Special Instruction 18 was submitted even later, but the Court gave Special Instruction 18 to the jury. Second, the instruction was not argumentative in that it closely tracked the CACI instruction, and even if it were allegedly argumentative, "such defects could easily have been rectified." *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 654. The City was never given an opportunity to discuss revisions to satisfy Plaintiff and the Court, unlike the revision process on the record embraced for Special Instruction 18. Moreover, although the Court said it did not have time to review *Nazir* to see if the wording of the instruction changed, *Nazir* was a summary judgment case where the wording of CACI 2405 was not discussed.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." *Soule v. General Motors Corp.*(1994) 8 Cal.4th 548, 570-572. The City recognizes that the Court may refuse an instruction that is incomplete or erroneous. *Whiteley, supra,* at 654. "But this rule is subject to the qualification that **it may be reversible error to refuse an instruction which is substantially correct and is unlikely to have misled the jury**. [Internal citations omitted]" *Id.* [emphasis added.] The City's proffered version of CACI 2405 was directly on point for a key issue in the case, unaltered from the original form except to insert names and pronouns. CACI 2405 was substantially correct, and likely to assist the jury rather than cause confusion.

The jury was presented with a plethora of evidence regarding the City's good cause to demote or terminate Taylor, its good faith belief that it had reasonable grounds to demote or terminate Taylor, and the reasonableness and propriety of the investigation. Indeed, such evidence was proffered and elicited by both parties, thereby warranting the use of CACI instruction 2405. This evidence included James Gardiner's investigation report #34 (Trial Exh. 265), the Notice of Termination (Trial Exh. 71), testimony by Gardiner [Frank Decl., ¶29, Exh. 8], Stehr [Frank Decl., ¶30, Exh. 9], Lowers [Frank Decl., ¶31, Exh. 10], and Taylor [Frank Decl., ¶32, Exh. 11], Puglisi [Frank Decl., ¶33, Exh. 12], and Misquez [Frank Decl., ¶34, Exh. 13, concerning the foundation for Gardiner's report #34, testimony by Varner [Frank Decl., ¶35, Exh. 14], Angel [Frank Decl., ¶36, Exh. 15] and LaChasse [Frank Decl., ¶37, Exh. 16] regarding the City's good faith reliance on Gardiner's report #34. Both sides gave opening statements regarding the bona fides of the City's assertion of reliance on Gardiner's investigation.

"Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict...[a determination that] depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury.' " *Soule, supra,* at 580. Factors to be considered when deciding whether an error in giving or refusing to give an instruction was prejudicial include (1) the state of the evidence, (2) the degree of conflict in evidence on critical issues, (3) closeness of the verdict, (4) the effect of counsel's arguments, (5) indications by the jury itself that it was misled, and (6) whether other instructions remedied the error. *Soule, supra,* at 570-571, 580-81.

Here, the state of the evidence justified a good cause instruction to help the jury put the City's reliance on Gardiner's investigation in the context of the law. The conflicts in the evidence was pitched, making it critical that the jury be given guidance on how to consider the bona fides of the City's reliance, the motivations of the City, and reasons given for the termination. The closeness of the verdict, 9-3, weighs heavily in making the instructional error prejudicial. Different jurors seemed to have differing views as to what the burden of proof was on retaliation, based on post-trial interviews of several jurors. Frank Decl., ¶18-19. No other instruction cured or mitigated the effect of the Court's failure to instruct on the good cause defense predicated on reliance

on the investigation to give the City reasonable grounds for believing Plaintiff committed misconduct. In summary, the factors weigh heavily to show the instructional errors were prejudicial.

C. The Court Erred in Giving Plaintiff's Surprise Special Jury Instruction No. 18, An Instruction Not Supported by Any Case Law.

On March 14, the last full day of testimony, Plaintiff made an oral motion to exclude the testimony of J.J. Puglisi, based on the assertion that Puglisi committed misconduct by reading some of the daily trial transcripts [8 RT 24:7-13]. The Court invited briefing on the issue before ruling [8 RT 47:6-17]. On March 15, the next morning, plaintiff withdrew the motion but instead submitted a proposed Special Instruction No. 18 [9 RT 5:4-6:23]. Plaintiff submitted no briefing on the motion or the surprise instruction; the defense had briefed the motion but, having no advance notice of the special instruction on the morning of the day closing arguments were to be given, was left to object to the instruction and argue its argumentative effect. Indeed, when defense counsel realized that CACI 2405 had been erroneously omitted from the list of jury instructions, they immediately notified Plaintiff's counsel via e-mail and provided a copy of the proposed instruction, and again provided a copy of the proposed instruction and its supporting case decisions before trial commenced the following day [Frank Decl., ¶11]. Plaintiff's counsel extended no such courtesies, but rather provided a copy of the proposed special instruction 18 (with no supporting citation or authority) to defense counsel on March 15, 2012, while Court was in session and on the record [9 RT, 5:4-6:10].

Plaintiff's special instruction 18 was given to the jury, notwithstanding the defense's objection to the argumentative nature of the instruction [9 RT, 6:24-9:25].[6] Plaintiff proferred no authority whatsoever to support this instruction, other than Plaintiff's assertion that Lt. Puglisi's review of prior trial testimony of other witnesses violated the Court's March 5, 2012 order excluding witnesses from the trial. Lt. Puglisi did not violate the Court's order. *Evidence Code* §

[6] Plaintiff's Special Instruction 18 read as follows, with modifications approved by the Court after argument on the record shown in brackets: "The court issued an order during this case excluding any witness [other than Mr. Taylor and Mr. Angel] to be called in the case from being present during the trial testimony of any other witness in this case. You may consider the fact that a witness in this case [either heard or] was provided with the trial testimony of other witnesses in this case in evaluating the credibility of the trial testimony of such a witness."

777(a) only regulates witnesses' physical presence in the courtroom. There is no precedent for extending such an order to prohibit witness preparation based on review of trial transcripts, and no special order barring transcript review was requested by plaintiff or granted by the Court in this case. Thus, there was no basis to give a specific instruction on this issue. Moreover, the instruction was proposed and provided to the City at the last minute, which was the Court's primary reason for rejecting the City's CACI 2405.

As stated above, "[i]nstructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' " *Soule, supra*, at 580. Actual prejudice must be assessed in the context of the individual trial record, and the multifactor test cited in Section B above is as pertinent in cases of instructional omission as in cases where instructions were erroneously given. *Id.* These factors again indicate strongly that the unprecedented special instruction was prejudicial. Moreover, post-trial interviews of pro-plaintiff jurors indicated that Lt. Puglisi's testimony was discredited because of this instruction. Frank Decl., ¶20.

D. There was no Substantial Evidence to Prove Retaliatory Animus for Taylor's Termination, Justifying a JNOV or at Minimum a New Trial.

The City seeks judgment notwithstanding the verdict ("JNOV") in this matter because no substantial evidence was presented at trial to substantiate the jury's 9-3 verdict on the essential element of retaliatory animus for Plaintiff's termination. It was uncontroverted that Chief LaChasse with input from Deputy Chief Tom Angel made the decision to terminate Plaintiff for cause. A party with the burden of proof on an issue must produce evidence establishing each essential fact required on his claim or defense. See Cal. Evid. Code §§ 500, 550; *Evans v. Paye* (1995) 32 Cal.App.4th 265, 281-82. But here there was no substantial direct or indirect proof that LaChasse or Angel were motivated by any improper reason such as the claimed "whistle-blowing" or for Plaintiff's filing of a DFEH claim, or for his pre-emptive lawsuit questioning former Chief Stehr's decision to restructure the Department.

Where as here there is insufficient evidence to support the verdict in favor of plaintiff, the defendant's motion for JNOV should be granted. *Maggini v. West Coast Life Ins. Co.* (1934) 136 Cal.App. 472; *see Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310; *Kaiser Cement &*

himself, Chief LaChasse, and Deputy Chief Angel. There was no factual basis for a reasonable juror to find that plaintiff's termination was motivated by any retaliatory animus.

E. The Cumulative Effect of Other Errors Warrants A New Trial

There were other errors in rulings by the Court that, taken as a whole in a case with such a close verdict, justify the granting of a new trial. See *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 976-77 (erroneous admission of expert testimony and instructional error combined to warrant reversal and new trial); *Emeryville Redevelopment v. Hacros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1109. The cumulative errors here include the Court's denial of the defense motion to augment its expert designation, the denial of defense motions in limine which allowed plaintiff unfairly to impugn several defense witnesses and consume precious time responding to the aspersions during the defense case in chief, the refusal of several other proffered defense jury instructions, and the four critical issues raised above in this brief.

III. CONCLUSION

Juror misconduct by 22% of the jurors who voted in Plaintiff's favor warrants a new trial. Errors of law by the Court in refusing CACI 2405 or in giving the unprecedented Plaintiff's Special Instruction No. 18 warrant a new trial. There was no substantial evidence of retaliatory intent, which warrants granting JNOV, or at a minimum a re-trial. The timing of Plaintiff's filing of this suit – shortly after he received notice that he was to be the "focus" of an investigation for interfering with Portos 1 Internal Affairs process – should be seen by the Court as an obvious subterfuge to manufacture a retaliation claim, even if some of the jurors failed to see through plaintiff's scheme. In a case where the verdict was the slimmest permissible 9-3 vote required, ordering a re-trial now will avoid years of delay on appeal, avoid a reversal on the same grounds presented at the trial level, and re-set the stage to avoid the miscarriage of justice occasioned by the plaintiff verdict here.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

v.

CITY OF BURBANK and DOES 1 through 100, inclusive,

Defendants.

Case No. BC 422252
Assigned to: Hon John L. Segal, Dept. 50

DEFENDANT CITY OF BURBANK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL OR ALTERNATIVE JNOV [Declarations Separately filed; Notice of Intent filed April 27, 2012]

DATE: June 6, 2012
TIME: 8:30 a.m.
DEPT: 50
Trial Date: March 5, 2012
Action Filed: Sept. 22, 2009

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Following an 11-day jury trial which concluded with the slimmest permissible (9-3) verdict for Plaintiff on March 19, 2012, a judgment against Defendant, City of Burbank ("City"), was entered on April 12, 2012. City and its police department were the focus of this wrongful termination case arising from the claimed demotion and subsequent discharge for cause of former Deputy Chief of Police William Taylor. The pre-trial and trial proceedings raised a number of legal issues that are implicated in the City's April 27, 2012 Notice of Intention to Move for New Trial. These legal issues include matters the City raised by pre-trial motions in limine, by the City's submission of proposed *voir dire* question for the Court to inquire of prospective jurors, by the *voir dire* process itself, by evidentiary rulings during the trial, and by the Court's decisions to give special instruction submitted by Plaintiff but to refuse a CACI instruction submitted by City.

While the Notice of Intention lists multiple grounds for granting a new trial, four issues are paramount. First, two jurors who voted for plaintiff failed to disclose major negative contacts with law enforcement despite being asked by the Court in *voir dire*. Trial Juror Nos. 6 and 7[1] were both arrested -- one involving a concealed weapon and the other involving repeat offenses and issuance of a Bench warrant -- and both pled no contest and were convicted. Prospective jurors' law enforcement contacts were so critical a ground for bias that the City formally requested the Court to inquire about it during *voir dire*. The Court did so inquire multiple times, but Jurors No. 6 and 7 remained silent. The defense did not learn of either juror's criminal record until after the trial. Concealment of bias by a juror during *voir dire* constitutes serious misconduct. In a highly contentious case, where the ultimate verdict after two days of

[1] For purposes of this memorandum of points and authorities and declarations in support thereof, the City will refer to both jurors and prospective jurors by their seat number in the courtroom, rather than by name, in an effort to protect the privacy of these private citizens. The City has also redacted trial transcripts from *voir dire* where prospective jurors were identified by name, and the City has handwritten in the seat numbers for reference. Excerpts from trial transcripts are attached as exhibits to Ronald Frank's declaration. Finally, the City has redacted records revealing criminal histories of Jurors No. 6 and 7 which are exhibits to the declaration of Carol Amberg, but unredacted copies of these records are being provided to Plaintiff's counsel. The City will be prepared to lodge unredacted copies of the trial transcripts and records revealing criminal backgrounds for Jurors No. 6 and 7 at the time of hearing, or at such earlier time as the Court instructs.

deliberations was only 9 votes to 3 in favor of the plaintiff, misconduct by a juror is sufficient to require granting a new trial.

Second, the Court itself erred in rejecting the City's proffered CACI instruction No. 2405. This Judicial Council-approved instruction defines good cause for termination to include reliance on an investigation that gave the employer a basis for believing plaintiff engaged in misconduct. Both sides submitted extensive evidence supporting the use of CACI 2405 at this trial. That evidence included Gardiner's investigation report #34 [Trial Exhibit ("Tr. Exh.") 265], the Notice of Termination [Tr. Ex. 71], testimony by Gardiner, Misquez, Puglisi, Stehr, Lowers, and Taylor concerning the foundation for Gardiner's report #34, testimony by Varner, Angel and LaChasse regarding the City's good faith reliance on that report, as well as opening statements by both sides regarding the bona fides of the City's assertion of reliance on Gardiner's investigation. A party is entitled to instructions on its legal theories and defenses where there is evidence to support them. The Court's failure to instruct on the good cause defense requires a new trial.

Third, the Court instructed the jury on Plaintiff's special instruction No. 18 regarding the effect on credibility of a witness having read trial testimony. The City objected to this surprise and improper instruction, which unfairly prejudiced the defense. JJ Puglisi, the Lieutenant who testified that Plaintiff interfered with his 2008 Internal Affairs investigation of Omar Rodriguez, truthfully revealed on cross that he looked at the trial transcript of only Plaintiff's and Lowers' testimony. Special Instr. No. 18 suggested to the jury that Puglisi's reading of that testimony violated the Court's witness exclusion order, even though Puglisi did not violate that order and the Court had not barred counsel from telling or reading witnesses the testimony of other witnesses. Post-trial interviews of jurors show that many several jurors discounted Puglisi's testimony because of that instruction. But neither the letter nor spirit of Evidence Code § 777(a) was violated since Puglisi's reading of Plaintiff's or Lowers' testimony did not and could not have tainted Puglisi's own testimony, which was totally consistent with the IA interview he gave to Gardiner 2-1/2 years before the trial.

Fourth, there was no substantial evidence to prove a retaliatory animus for Taylor's termination. Plaintiff's retaliation case was limited to evidence that Stehr and Flad had some axe to grind with Taylor. There was no evidence that Scott LaChasse or Tom Angel, who made the

termination decision without input from Flad or Stehr, had any such axe or motive. The Court, sitting as the 13th juror, observed the dearth of proof of retaliatory motive for Plaintiff's termination, and should either grant a JNOV on these grounds, or at a minimum order a new trial.

Any one of these errors by themselves warrants a new trial. However, rather than await the outcome of a time-consuming and expensive appeal, the City prefers to correct these errors at the trial court level and re-try the case now rather than after a likely protracted appeal.

ARGUMENT

II. THE COURT SHOULD GRANT THE MOTON FOR A NEW TRIAL BECAUSE ONE OR MORE OF THE STATUTORY GROUNDS HAS BEEN MET.

The grounds for a new trial are wholly statutory. *Smith v. Superior Court* (1976) 64 Cal.App.3d 434, 436. Pursuant to Code of Civil Procedure § 657, a jury verdict may be vacated, in whole or in part, and a new trial granted, for any of the following causes materially affecting the substantial rights of an aggrieved party: (1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial; (2) misconduct of the jury; (6) insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law; or (7) error in law, occurring at the trial and excepted to by the party making the application. Where the judge hearing the motion for a new trial presided over the trial, the Court need not review the entire trial transcript in making its decision. *Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1324. It is the trial judge's duty to set aside a jury verdict when his conscience is impressed with the injustice of it. *Moore v. San Francisco* (1970) 5 Cal.App.3d 728, 738. Here, the verdict should be set aside.

A. Jurors 6 and 7 Withheld Material Information During *Voir Dire* Which Would Have Revealed a Potential Bias, Thereby Precluding Defense Counsel from Asking Follow Up Questions and Exercising A Peremptory Challenge.

A defendant has the right to trial by unbiased, impartial jurors. *People v. Polk* (2010) 190 Cal.App.4th 1183, 1201. The City was deprived of this right due to the concealment of anti-law enforcement bias by Trial Juror Nos. 6 and 7. The concealment of bias by a juror during *voir dire* constitutes serious misconduct warranting a new trial. *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 509, citing *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.

Like the instant case, *Enyart* involved jurors' concealed biases against a police department in a case with the bare minimum 9-3 verdict for a plaintiff; the Second District held the trial court abused its discretion in failing to grant a motion for new trial on the grounds of prejudicial juror misconduct. This Court should exercise its discretion and order a new trial on those grounds.

A party moving for a new trial on the ground of juror misconduct must establish both that misconduct occurred and that the misconduct was prejudicial. *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 57. "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution. One of the purposes of voir dire is to expose the possible biases of potential jurors, who can be excused for cause if bias is demonstrated or excused through a peremptory challenge if counsel suspects a possibility of bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully. A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." *Ovando, supra,* 159 Cal.App.4th at p. 58; see *In re Hamilton* (1999) 20 Cal.4th 273, 294 ("when a juror conceals bias on *voir dire*...the event is called juror misconduct"). "A showing of misconduct creates a presumption of prejudice." *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 162.

In the present case, Juror No. 6 – who voted against the City -- concealed the fact of his past negative experience with law enforcement during *voir dire*. After the verdict was given, counsel for the City discovered that Juror No. 6 was arrested in 2003 for possession of a concealed weapon (a dirk or dagger) and failure to disperse, both misdemeanor charges. See attached Declaration of Carol Amberg ("Amberg Decl.") and City's Request for Judicial Notice filed concurrently herewith. He bargained a plea, pled no contest, and was convicted of the lesser count. See Amberg Decl., *supra*. None of the City's trial counsel, nor the City Attorney's office, knew of Juror No. 6's criminal background, or his concealment of this material information, until well after the trial was complete. See Declarations of Ronald F. Frank, ¶25; Linda M. Savitt, ¶6; and Carol Humiston, ¶2.

Similarly, Juror No. 7 – who also voted against the City – concealed information during

voir dire regarding a series of misdemeanor charges filed against her. Juror No. 7's criminal record also was not discovered until after the trial was completed and the verdict was given. See Frank Decl., ¶25, Savitt Decl., ¶6, and Humiston Decl., ¶2. Juror No. 7's criminal record includes three separate misdemeanor cases with charges including driving with a suspended license, a marijuana charge, and driving without insurance. Amberg Decl., ¶¶11, 13-14 and City's Request for Judicial Notice filed concurrently herewith. A bench warrant was issued for her failure to appear in court and the court docket shows she was arrested and appeared "in custody" at her arraignment less than one year before she became a trial juror here. All of these charges were filed since late 2009, i.e, within 2-1/2 years of the trial. These are prima facie proof of negative contact with law enforcement officials, ones Juror No. 7 chose not to disclose so she could remain on the jury and vote against a law enforcement agency.

1. The Court Directed Jurors To Disclose Information Regarding Past Dealings, Good or Bad, With Law Enforcement, and Many Did.

Prior to *voir dire* the Court explained that the "goal of jury selection is to choose 12 jurors and an appropriate number of alternate jurors who can be fair and impartial to both sides and who can decide the case based solely on the evidence you hear in this courtroom and not from any other source." [1 Reporter's Transcript ("RT"),12:25-13:2[2] (emphasis added).] During *voir dire*, prospective juror 6, a recent law school graduate, interrupted the proceedings and advised the Court that he did not think he could be fair and impartial due to his morals and legal training. [1 RT, 31:3-32:24.] Thereafter, the Court asked whether anyone else could not be fair and impartial. In response, prospective juror 3 raised her hand and volunteered that she had previously had a negative experience with law enforcement, and she followed up later stating that the officers had been rough when handcuffing her. [1 RT, 32:25-33:8; 40:7-25.] Subsequently the Court asked whether anyone "had any contact or involvement with law enforcement that was particularly positive or negative that you think might affect your ability to be fair and impartial" and then

[2] Trial commenced on March 5, 2012, and continued for 11 total days ending March 19, 2012. References to the RT will be by volume, with volume 1 being the 1st day of trial, so 1 RT refers to the first volume of RT or the 1st day of trial, and then page:line references provided such as 1 RT 3:5-7, etc.

again asked, "Have any of you had any contact with a law enforcement organization of any kind, such as the police or security or anything like that, that was strictly positive or negative." [1 RT, 39:11-19 (emphasis added).] Prospective juror 6 again raised his hand and described his negative experiences with law enforcement [1 RT, 39:21-40:3]. Another prospective juror, number 2, explained that he did not think he could be impartial due to a 23-year-old DUI conviction. [1 RT, 49:2-50:25.] Still another prospective juror, number 1, shared a negative experience with law enforcement from 10 years earlier [1 RT, 57:14-24], and prospective juror 18 shared his extensive arrest record for nonviolent civil disobedience [1 RT, 102:25-103:11].

None of the prospective jurors who revealed their biases against law enforcement or prior negative contact with law enforcement officers remained as trial jurors [Frank Decl ¶7]. The forthcoming jurors who did disclose their past negative contact with police were dismissed either by peremptory challenge or for cause.[3]

2. Information About Past Contacts With Law Enforcement Was Material to The City's Effort to Select A Fair Jury.

The fact that a prospective juror had a prior negative contact with a law enforcement official or agency was material to the City in *voir dire* [Frank Decl. ¶¶4-8]. The City filed a list of proposed *voir dire* topics and questions to the Court to inquire of prospective jurors, including the following topic designed to reveal actual or implied bias against police agencies:

> "3. Have any of you had any contact or involvement, whether positive or negative, with members of a law enforcement organization such as police, security, military, or otherwise?
>
> a. If you would prefer to talk about that contact in private, let me know and we can discuss it separately from other jurors.
>
> b. Is there anything about that experience that would make you more likely to favor one side or the other in this case?" [Feb. 27, 2012 Proposed Voir Dire Questions, p. 3].

The Court itself recognized the materiality of this requested *voir dire* topic by selecting it as one of the few of the defense-requested list as to which the Court actually asked prospective jurors. The City desired to learn both of the existence of a past contact and whether prospective jurors

[3] Prospective juror 6 was dismissed for cause by the Court [1 RT, 91:8-92:5]. Prospective juror 3 was the City's first peremptory challenge [id. at 92:19-21] because of her negative experience with the LAPD, the same agency with which Jurors Nos. 6 and 7 had their prior negative experiences [Frank Decl. ¶7]. Prospective jurors 1 and 18 were also excused by peremptory challenge, but by Plaintiff before the defense decided to excuse them [1 RT, 92:10-13, 115:1-4].

believed it would bias them, so that counsel could assess both the potential for a challenge for cause and the possible use of a peremptory challenge. [Savitt Decl. ¶3; Frank Decl. ¶8]

3. Juror Nos. 6 and 7 Intentionally Concealed Material Information on Voir Dire that Would Have Revealed Actual or Implied Bias.

Although Juror No. 6 actively participated in *voir dire* [see, e.g., 1 RT, 11:16-12:2; 25:1-16; 36:1-11; 43:27-44:27; 51:26-52:10], he did not volunteer any information in response to inquiries pertaining specifically to his past negative experience with law enforcement, even after other prospective jurors had revealed their negative contacts with law enforcement officials as set forth above. Similarly, Juror No. 7 also participated in *voir dire*, but did not reveal her negative experiences with law enforcement [1 RT, 20:4-21:2; 73:9-74:25; 87:1-7]. Even when a broad question was posed by counsel for the City, Ms. Savitt, as to whether there is "anything that somebody feels they need to share with us that would help us evaluate whether you're...an unbiased and fair juror or someone who would be comfortable sitting as a juror in this type of case," both Jurors No. 6 and 7 remained silent.

Even had Jurors No. 6 and 7 been uncomfortable disclosing their respective experiences with law enforcement openly before the other prospective jurors, the Court offered the option for prospective jurors to speak outside of the presence of others to hear such information [1 RT, 13:20-27; 99:8-28]. The City had specifically suggested the option of a private sidebar in its proposed Voir Dire Questions to encourage honesty [Frank Decl. ¶5]. Neither Jurors No. 6 nor 7 volunteered any information pertaining to their prior respective arrests and convictions. [*Id.*] Moreover, neither Jurors No. 6 nor 7 revealed either the facts of their prior contacts with law enforcement or their respective self-assessments as to whether their prior contact would lead them to favor or disfavor a particular side in this trial. [*Id.*] An arrest and conviction are presumptively negative contacts with police. Whether either juror willfully concealed their prior arrests and convictions in order to remain on the jury, or made an unspoken judgment that they believed it would not affect their fairness, both Jurors No. 6 and 7 committed prejudicial misconduct.

Jurors No. 6 and 7's silence during *voir dire* in response to several pointed inquiries by the Court and counsel as to prospective jurors' experiences with law enforcement, and despite

revelations by several other prospective jurors regarding their past experiences with law enforcement, reveals their respective intentional concealment of their own criminal background. "[I]ntentional concealment of material information by a potential juror may constitute implied bias." *People v. McPeters* (1992) 2 Cal.4th 1148, 1175. Nevertheless, a juror's concealment of material facts on *voir dire* need not have been intentional in order to be considered misconduct. The right to an impartial jury is "independent from the intent of the juror to conceal". *Shipley v. Permanente Hospitals* (1954) 127 Cal.App.2d 417, 424, disapproved on other grounds by *Kollert v. Cundiff* (1958) 50 Cal.2d 768 and *Dunford v. General Water Heater Corp.* (1957) 150 Cal.App.2d 260.

4. The Misconduct of Juror Nos. 6 and 7 was Prejudicial to the City.

Juror misconduct raises a rebuttable presumption that the misconduct was prejudicial. *In re Hamilton, supra*, 20 Cal.4th at p. 295. Misconduct is prejudicial if there is a substantial likelihood that the juror was biased and that the misconduct affected the verdict. (Citations omitted.)" *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 57-58. The facts of Jurors Nos. 6 and 7 respective negative contacts with law enforcement and their arrest/ citations and *nolo* pleas, were pertinent information about which the Court and counsel should have had an opportunity to ask follow up questions, as they had of other jurors in light of their various disclosures during *voir dire*. Moreover, even if the Court had opted not to dismiss Jurors No. 6 or 7 for cause based on their respective criminal histories, the City was deprived of the opportunity to use one or two of its four remaining peremptory challenges to dismiss Jurors No. 6 or 7 from the jury panel. [Savitt Decl. ¶ 6; Frank Decl. ¶25.] Therefore, since Jurors No. 6 and 7 both ultimately voted against the City in a nine to three vote, their respective acts of misconduct were independently prejudicial to the City as a matter of law. *See Enyart, supra*, 76 Cal.App.4th at p. 511 ("Given the closeness of the verdict ...[,] bias on the part of any one of the majority-voting jurors is **necessarily prejudicial**" where there was a nine-to-three vote)(emphasis added).[4]

[4] Juror No. 6 was one of a very few jurors who remained in the corridor after the verdict; he told counsel that he discounted the testimony of Lt. Puglisi based on the Court's instruction concerning witness review of trial transcripts [Frank Decl. ¶18].

B. The Court Erred in Failing to Give CACI Jury Instruction No. 2405, Which was Supported by the Case Law and Warranted by the Evidence at Trial.

On the ninth day of trial, March 15, 2012, both Plaintiff and the City presented the Court with new jury instructions [9 RT, 1:17-28; 3:18-4:11; 5:4-6:10.] Plaintiff's proposed special instruction 18, which will be discussed in Section C below, was preceded by an oral motion to strike the testimony of a witness who admitted to reviewing a portion of the trial transcript before his testimony. The City proposed CACI instruction No. 2405, inadvertently omitted from the original jury instruction packet but presented immediately after the oversight was discovered [9 RT, 1:19-28; 3:18-20]. CACI No. 2405 is supported by established legal authority[5] and the City made no changes to the approved form, other than filling in the names of the parties as instructed by the brackets within the form [9 RT, 3:18-4:11.] See Frank Decl., Exh. 5. Following oral argument on these new instructions, the Court decided to instruct the jury on Plaintiff's unsupported Special Instruction No. 18, but declined the give CACI 2405 (which was supported by both a California Supreme Court decision and a Court of Appeal decision cited by counsel and copies of those opinions were submitted to the Court) for reasons the Court itself conceded are "thin." [9 RT, 159:17-27.]

The City's version of CACI 2405 closely tracked the original version of the instruction:

> William Taylor claims that City of Burbank did not have good cause to discharge or demote him for misconduct. City of Burbank had good cause to discharge or demote William Taylor for misconduct if City of Burbank, acting in good faith, conducted an appropriate investigation giving him *[sic]* reasonable grounds to believe that William Taylor engaged in misconduct.
>
> An appropriate investigation is one that is reasonable under the circumstances and includes notice to the employee of the claimed misconduct and an opportunity for the employee to answer the charge of misconduct before the decision to discharge or demote is made. You may find that City of Burbank had good cause to discharge or demote William Taylor without deciding if William Taylor actually engaged in misconduct.

See Frank Decl., Exh. 5.

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[5] CACI No. 2405 is entitled "Breach of Implied Employment Contract – Unspecified Term – "Good Cause" Defined – Misconduct, and is based upon the California Supreme Court case entitled *Cotran v. Rollins Hudig Hall Intern., Inc.* (1998) 17 Cal.4th 93, 107-108. Regardless of the title of the instruction as to an implied employment contract, CACI 2405 did pertain to the case here pursuant to *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 278-279. *Nazir* applies *Cotran* to a retaliation case, which was the claim in the case at bar.

The Court expressed its reasons for rejecting CACI 2405 as follows: "It was, first of all, late. So I didn't have the time to research it as I did with the other ones. So I didn't really have a chance or an opportunity to do that with the last instruction. That is number 1. Number 2, I thought that as phrased, as applied to this case, it was argumentative. It seemed to track the CACI instruction, but I thought it was a little strong because I know you had a case which I didn't get a chance to read that says that instruction also applies in retaliation cases. But I couldn't match it up to see if the wording changed. That was two. And the third reason was -- I can't remember the third reason. ... I can't remember the third reason, yes." [9 RT, 155:20-156:28.]

The Court's reasons for denying CACI 2405 are unjustified. The Court's tardiness reason does not hold up as Plaintiff's Special Instruction 18 was submitted even later, but the Court gave Special Instruction 18 to the jury. Second, the instruction was not argumentative in that it closely tracked the CACI instruction, and even if it were allegedly argumentative, "such defects could easily have been rectified." *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 654. The City was never given an opportunity to discuss revisions to satisfy Plaintiff and the Court, unlike the revision process on the record embraced for Special Instruction 18. Moreover, although the Court said it did not have time to review *Nazir* to see if the wording of the instruction changed, *Nazir* was a summary judgment case where the wording of CACI 2405 was not discussed.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." *Soule v. General Motors Corp.*(1994) 8 Cal.4th 548, 570-572. The City recognizes that the Court may refuse an instruction that is incomplete or erroneous. *Whiteley, supra*, at 654. "But this rule is subject to the qualification that **it may be reversible error to refuse an instruction which is substantially correct and is unlikely to have misled the jury**. [Internal citations omitted]" *Id.* [emphasis added.] The City's proffered version of CACI 2405 was directly on point for a key issue in the case, unaltered from the original form except to insert names and pronouns. CACI 2405 was substantially correct, and likely to assist the jury rather than cause confusion.

The jury was presented with a plethora of evidence regarding the City's good cause to demote or terminate Taylor, its good faith belief that it had reasonable grounds to demote or terminate Taylor, and the reasonableness and propriety of the investigation. Indeed, such evidence was proffered and elicited by both parties, thereby warranting the use of CACI instruction 2405. This evidence included James Gardiner's investigation report #34 (Trial Exh. 265), the Notice of Termination (Trial Exh. 71), testimony by Gardiner [Frank Decl., ¶29, Exh. 8], Stehr [Frank Decl., ¶30, Exh. 9], Lowers [Frank Decl., ¶31, Exh. 10], and Taylor [Frank Decl., ¶32, Exh. 11], Puglisi [Frank Decl., ¶33, Exh. 12], and Misquez [Frank Decl., ¶34, Exh. 13, concerning the foundation for Gardiner's report #34, testimony by Varner [Frank Decl., ¶35, Exh. 14], Angel [Frank Decl., ¶36, Exh. 15] and LaChasse [Frank Decl., ¶37, Exh. 16] regarding the City's good faith reliance on Gardiner's report #34. Both sides gave opening statements regarding the bona fides of the City's assertion of reliance on Gardiner's investigation.

"Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict...[a determination that] depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury.' " *Soule, supra,* at 580. Factors to be considered when deciding whether an error in giving or refusing to give an instruction was prejudicial include (1) the state of the evidence, (2) the degree of conflict in evidence on critical issues, (3) closeness of the verdict, (4) the effect of counsel's arguments, (5) indications by the jury itself that it was misled, and (6) whether other instructions remedied the error. *Soule, supra*, at 570-571, 580-81.

Here, the state of the evidence justified a good cause instruction to help the jury put the City's reliance on Gardiner's investigation in the context of the law. The conflicts in the evidence was pitched, making it critical that the jury be given guidance on how to consider the bona fides of the City's reliance, the motivations of the City, and reasons given for the termination. The closeness of the verdict, 9-3, weighs heavily in making the instructional error prejudicial. Different jurors seemed to have differing views as to what the burden of proof was on retaliation, based on post-trial interviews of several jurors. Frank Decl., ¶18-19. No other instruction cured or mitigated the effect of the Court's failure to instruct on the good cause defense predicated on reliance

on the investigation to give the City reasonable grounds for believing Plaintiff committed misconduct. In summary, the factors weigh heavily to show the instructional errors were prejudicial.

C. The Court Erred in Giving Plaintiff's Surprise Special Jury Instruction No. 18, An Instruction Not Supported by Any Case Law.

On March 14, the last full day of testimony, Plaintiff made an oral motion to exclude the testimony of J.J. Puglisi, based on the assertion that Puglisi committed misconduct by reading some of the daily trial transcripts [8 RT 24:7-13]. The Court invited briefing on the issue before ruling [8 RT 47:6-17]. On March 15, the next morning, plaintiff withdrew the motion but instead submitted a proposed Special Instruction No. 18 [9 RT 5:4-6:23]. Plaintiff submitted no briefing on the motion or the surprise instruction; the defense had briefed the motion but, having no advance notice of the special instruction on the morning of the day closing arguments were to be given, was left to object to the instruction and argue its argumentative effect. Indeed, when defense counsel realized that CACI 2405 had been erroneously omitted from the list of jury instructions, they immediately notified Plaintiff's counsel via e-mail and provided a copy of the proposed instruction, and again provided a copy of the proposed instruction and its supporting case decisions before trial commenced the following day [Frank Decl., ¶11]. Plaintiff's counsel extended no such courtesies, but rather provided a copy of the proposed special instruction 18 (with no supporting citation or authority) to defense counsel on March 15, 2012, while Court was in session and on the record [9 RT, 5:4-6:10].

Plaintiff's special instruction 18 was given to the jury, notwithstanding the defense's objection to the argumentative nature of the instruction [9 RT, 6:24-9:25].[6] Plaintiff proferred no authority whatsoever to support this instruction, other than Plaintiff's assertion that Lt. Puglisi's review of prior trial testimony of other witnesses violated the Court's March 5, 2012 order excluding witnesses from the trial. Lt. Puglisi did not violate the Court's order. *Evidence Code* §

[6] Plaintiff's Special Instruction 18 read as follows, with modifications approved by the Court after argument on the record shown in brackets: "The court issued an order during this case excluding any witness [other than Mr. Taylor and Mr. Angel] to be called in the case from being present during the trial testimony of any other witness in this case. You may consider the fact that a witness in this case [either heard or] was provided with the trial testimony of other witnesses in this case in evaluating the credibility of the trial testimony of such a witness."

777(a) only regulates witnesses' physical presence in the courtroom. There is no precedent for extending such an order to prohibit witness preparation based on review of trial transcripts, and no special order barring transcript review was requested by plaintiff or granted by the Court in this case. Thus, there was no basis to give a specific instruction on this issue. Moreover, the instruction was proposed and provided to the City at the last minute, which was the Court's primary reason for rejecting the City's CACI 2405.

As stated above, "[i]nstructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' " *Soule, supra*, at 580. Actual prejudice must be assessed in the context of the individual trial record, and the multifactor test cited in Section B above is as pertinent in cases of instructional omission as in cases where instructions were erroneously given. *Id.* These factors again indicate strongly that the unprecedented special instruction was prejudicial. Moreover, post-trial interviews of pro-plaintiff jurors indicated that Lt. Puglisi's testimony was discredited because of this instruction. Frank Decl., ¶20.

D. There was no Substantial Evidence to Prove Retaliatory Animus for Taylor's Termination, Justifying a JNOV or at Minimum a New Trial.

The City seeks judgment notwithstanding the verdict ("JNOV") in this matter because no substantial evidence was presented at trial to substantiate the jury's 9-3 verdict on the essential element of retaliatory animus for Plaintiff's termination. It was uncontroverted that Chief LaChasse with input from Deputy Chief Tom Angel made the decision to terminate Plaintiff for cause. A party with the burden of proof on an issue must produce evidence establishing each essential fact required on his claim or defense. See Cal. Evid. Code §§ 500, 550; *Evans v. Paye* (1995) 32 Cal.App.4th 265, 281-82. But here there was no substantial direct or indirect proof that LaChasse or Angel were motivated by any improper reason such as the claimed "whistle-blowing" or for Plaintiff's filing of a DFEH claim, or for his pre-emptive lawsuit questioning former Chief Stehr's decision to restructure the Department.

Where as here there is insufficient evidence to support the verdict in favor of plaintiff, the defendant's motion for JNOV should be granted. *Maggini v. West Coast Life Ins. Co.* (1934) 136 Cal.App. 472; *see Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310; *Kaiser Cement &*

Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal.App.3d 948. Further, where a critical element of plaintiff's case is supported only by inferences which are contrary to "clear, positive, uncontradicted [evidence] of such a nature that it cannot rationally be disbelieved," a JNOV should be granted since such inferences do not constitute substantial evidence supporting the verdict. *Teich v. General Mills, Inc.* (1959) 170 Cal.App.2d 791, 799. The City recognizes that the granting of a JNOV following a jury's verdict is not common. However, the City also recognizes the well-established rule of law that when a verdict is wholly unsupported by the evidence presented at trial, a court has a duty to grant a motion for JNOV. *Holocombe v. Burns* (1960) 183 Cal.App.2d 811, 815-16.

If the Court were not inclined to enter judgment in the City's favor, it should grant a new trial based on a dearth of substantial evidence to prove that retaliatory animus was a motivating cause for plaintiff's termination. In jury trials, the parties have in effect two hearings, one before the jury and a second before the Court acting "as a thirteenth juror." *Norden v Hartman* (1952) 111 Cal.App.2d 751, 758. In considering a motion for new trial based on insufficient of the evidence, the Court makes an independent appraisal of the evidence, including all presumptions and inferences to be drawn. *Brown vs Guy* (1956) 144 Cal.App.2d 659, 661. Plaintiff's proof of retaliation only truly pertained to the so-called "demotion" claim which the jury obviously rejected based on its damages award of only Captain salary and damages, not the Deputy Chief measure of damages [Frank Decl., ¶27]. The issues regarding plaintiff's purported conflicts with former Chief Stehr in 2007 through May of **2009** all lacked the requisite proximity in time to be motivating causes for the June **2010** termination by then-Chief Scott LaChasse. Stehr testified without dispute that he retired as of December 2009 and had no role in LaChasse's consideration of Gardiner's report #34 or the discipline LaChasse determined to be appropriate. LaChasse did testify that he had the assistance of Tom Angel in the review and adjudication of the Gardiner investigation reports, but that Mike Flad had no role or input in the review or adjudication of those reports. Three witnesses testified without contradiction that City Manager Mike Flad was "walled off" from the disciplinary decisions following Gardiner's investigation reports: Mr. Flad

himself, Chief LaChasse, and Deputy Chief Angel. There was no factual basis for a reasonable juror to find that plaintiff's termination was motivated by any retaliatory animus.

E. The Cumulative Effect of Other Errors Warrants A New Trial

There were other errors in rulings by the Court that, taken as a whole in a case with such a close verdict, justify the granting of a new trial. See *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 976-77 (erroneous admission of expert testimony and instructional error combined to warrant reversal and new trial); *Emeryville Redevelopment v. Hacros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1109. The cumulative errors here include the Court's denial of the defense motion to augment its expert designation, the denial of defense motions in limine which allowed plaintiff unfairly to impugn several defense witnesses and consume precious time responding to the aspersions during the defense case in chief, the refusal of several other proffered defense jury instructions, and the four critical issues raised above in this brief.

III. CONCLUSION

Juror misconduct by 22% of the jurors who voted in Plaintiff's favor warrants a new trial. Errors of law by the Court in refusing CACI 2405 or in giving the unprecedented Plaintiff's Special Instruction No. 18 warrant a new trial. There was no substantial evidence of retaliatory intent, which warrants granting JNOV, or at a minimum a re-trial. The timing of Plaintiff's filing of this suit – shortly after he received notice that he was to be the "focus" of an investigation for interfering with Portos 1 Internal Affairs process – should be seen by the Court as an obvious subterfuge to manufacture a retaliation claim, even if some of the jurors failed to see through plaintiff's scheme. In a case where the verdict was the slimmest permissible 9-3 vote required, ordering a re-trial now will avoid years of delay on appeal, avoid a reversal on the same grounds presented at the trial level, and re-set the stage to avoid the miscarriage of justice occasioned by the plaintiff verdict here.

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